

Dock
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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A VARIANCE PERMIT)
GRANTED TO RICHARD A. SPENCER BY)
PIERCE COUNTY AND DENIED BY THE)
DEPARTMENT OF ECOLOGY)

RICHARD A. SPENCER and PIERCE)
COUNTY,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent.)

SHB No. 242

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

PER W. A. GISSBERG:

This matter, a Request for Review to a denial by the Department of Ecology of a variance granted by Pierce County, came before the Shorelines Hearings Board (Robert E. Beaty, W. A. Gissberg, Robert F. Hintz, William Johnson, and Chris Smith) on February 8, 1977 in Lacey, Washington. Ellen D. Peterson, hearing examiner, presided.

Appellant, Richard A. Spencer, appeared through his attorney,

1 Joseph F. Quinn; Pierce County, joined as an appellant by Order of this
2 Board, did not appear; respondent, Department of Ecology, appeared by and
3 through its attorney, Laura E. Eckert, Assistant Attorney General.

4 Having heard the testimony and being fully advised, the Board
5 makes these

6 FINDINGS OF FACT

7 I

8 In 1975 appellant purchased a home, lot and second class tidelands
9 situated on the easterly shorelands of Gig Harbor in Pierce County.
10 However, he continued to moor his 30 foot sailboat in Tacoma. Because
11 of the personal inconvenience caused him by driving to and from the
12 Tacoma Yacht Club, he applied for and received from Pierce County a
13 variance from its master program authorizing him to construct a pier,
14 ramp and float whose combined length would extend 135 feet waterward of
15 mean high tide in front of his residence. The improvement would cost
16 more than \$2,500.00 and its proposed length is needed to accommodate
17 his sailboat in view of its four and one-half foot draft which would
18 be aground at low tide when alongside any dock shorter than 135 feet.
19 With a pier of 50 foot length it would be aground one-half of the time.

20 II

21 Acting pursuant to the Shoreline Management Act of 1971 which
22 requires any permit for a variance to be submitted to the Department
23 of Ecology (DOE) for its approval or disapproval, that agency disapproved
24 the proposed variance on the grounds that it did not satisfy certain
25 requirements of its regulations, namely, WAC 173-14-150(1) and (3).
26 Such disapproval precipitated appellant's Request for Review before

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1 this Board.

2 III

3 The policy provisions of the Pierce County Shoreline Master Program,
4 insofar as they effect this matter, discourage piers for single family
5 residences, encourage mooring buoys and require as a condition precedent
6 to the construction of a dock that it be demonstrated that use of
7 commercial or marina moorage, floating buoy, joint use moorage pier, dry
8 storage and public launching ramp are not feasible. For the purposes of
9 this review we find that appellant has proven that none of such
10 alternatives is now feasible.

11 IV

12 A further and additional requirement of the Pierce County Shoreline
13 Master Program is that:

14 3. Residential docks on salt water, when allowed, shall
15 meet the following design criteria:

16 a. Maximum length shall be fifty (50) feet or only
17 so long as to obtain a depth of eight (8) feet,
18 whichever is less as measured at mean high
19 water.

18 V

19 Immediately south of appellant's property there are five other
20 existing docks, the longest of which is 137 feet. There are many other
21 piers or docks in Gig Harbor ranging in length from 8 feet to 180 feet.
22 The size of the boats owned by the upland owner seems to dictate the
23 length of the piers. However, all of the existing docks for which
24 permits would now be required were constructed prior to the Shoreline
25 Management Act of 1971 and the adoption of Pierce County's Shoreline
26 Master Program. The DOE has not approved any variances relaxing the

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1 50 foot dock master program requirement.

2 VI

3 The present value of appellant's property is between seventy and
4 seventy-five thousand dollars. The construction of a 135 foot dock
5 would increase the property value by \$10,000 to \$15,000--a 50 foot dock
6 by \$2,500 to \$3,000. The evidence is silent as to the cost of such
7 alternative sized dock construction.

8 VI

9 The subject property has no unique features distinguishing it from
10 other properties along the easterly shoreline of Gig Harbor.

11 VIII

12 There have been, and apparently still are, divergent opinions
13 within the Department concerning the interpretation to be given the
14 DOE's variance regulation. It also appears that there have been
15 different applications of the variance regulation. At best, those
16 within the Department are confused with respect to the interpretation
17 and application of its variance requirements found in WAC 173-14-150.

18 IX

19 Any Conclusion of Law hereinafter stated which may be deemed
20 a Finding of Fact is hereby adopted as such.

21 From these Findings the Shorelines Hearings Board comes to these

22 CONCLUSIONS OF LAW

23 I

24 We refer to SHB 218, Kooley and Pierce County v. Department of
25 Ecology for our view pointing out that respondent has an option,
26 consistent with the Shoreline Management Act, of establishing a

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1 different standard for a "use variance" than for an "area variance."
2 In the latter type the DOE could have, but has not, adopted a rule
3 permitting such without a showing of unnecessary hardship. Instead, it
4 has adopted a rule for both types of variances which requires a showing
5 of both hardship and practical difficulties as set forth in
6 WAC 173-14-150(1) and (2) and (3) and (4). The significance of the
7 foregoing is that under the DOE rule before any type of variance can be
8 approved in this state the property owner carries the heavy threshold
9 burden of proving that without the variance he cannot make any reason-
10 able use of his property. If he cannot do so, the variance must fail.
11 If he can do so he must also prove that the variance meets the require-
12 ments of WAC 173-14-150(2) and (3) and (4).

3 II

14 Appellant has failed to prove that if he complies with the provisions
15 of the master program (builds a 50 foot dock) he cannot make any reason-
16 able use of his property. Thus, the action of the DOE in disapproving
17 the variance must be affirmed.

18 III

19 A variance is not authorized solely to accommodate the highest and
20 best use of property, but rather where the regulation does not permit
21 any reasonable use.

22 IV

23 A variance may not be granted merely on a showing that the new use
24 will not change the essential character of the neighborhood. It
25 remains necessary to prove that all of the requirements of WAC 173-14-150
-6 are met. Nor does mere personal hardship or inconvenience constitute

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1 sufficient ground for the granting of the variance.

2 V

3 The instant variance also would not be in harmony with the general
4 purpose and intent of the master program and must fail for that
5 additional reason.

6 VI

7 Appellant also contends, in effect, that the DOE variance rule is
8 invalid and beyond the authority of the Department. We disagree and
9 follow the legal principles enunciated in Weyerhaeuser Company v.
10 Department of Ecology, 86 Wn.2d 310 (1976). Administrative rules enacted
11 pursuant to a specific legislative delegation are presumed to be valid
12 and should be upheld when they are reasonably consistent with the
13 statute being implemented. While this Board may have a different view
14 than the DOE as to the standards to apply to different types of variances
15 we cannot invalidate its rule "merely because . . . the rule is unwise."
16 Weyerhaeuser, supra.

17 VII

18 Appellant contends that he must prevail because the Legislature
19 enacted chapter 117 of Laws of 1975-76 2nd Ex. Sess (codified as
20 RCW 43.21H), and that the DOE has not reconsidered its variance rules
21 nor the instant permit in light of economic values. The pertinent
22 parts of that statute provide:

23 The purpose of this chapter is to assert that it is the intent
24 of the legislature that economic values are given appropriate
25 consideration along with environmental, social, health and
26 safety considerations in the promulgation of rules by state
27 and local government.

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1 All state agencies . . . shall adopt methods and procedures
2 which will insure that economic values will be given
3 appropriate consideration in the rule-making process along
4 with environmental, social, health, and safety considerations.

5 It is our conclusion that the statute applies only prospectively,
6 that is, to rules adopted after the effective date of that Act. To
7 hold otherwise would invalidate most state and local governmental
8 rules, even those relating strictly to health and safety.

9 While the DOE did not consider the economic impact of the denial
10 of appellant's requested variance nor make a cost-benefit study thereof,
11 we hold that it was not required to do so. The State Economic Policy
12 statute applies only to the adoption of rules, not to administrative
13 actions taken pursuant to such rules.

14 VIII

15 We have carefully considered the other contentions of appellant
16 and find them to be without merit.

17 IX

18 Any Finding of Fact which should be deemed a Conclusion of Law
19 is hereby adopted as such.


20 Therefore, the Shorelines Hearings Board issues this

21 ORDER

22 The disapproval of the variance is affirmed.

1 DATED this 23^d day of February, 1977.

2 SHORELINELINES HEARINGS BOARD

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4 ROBERT E. BEATY, Member

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6 W. A. GISSBERG, Member

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8 ROBERT F. KINTZ, Member

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10 WILLIAM JOHNSON, Member

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12 CHRIS SMITH, Member

13 Did not participate
14 ART BROWN, Chairman

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